IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.355 OF 2004

Union of India,
represented through Chief Engineer,
Navy Mumbai, having his office at
26, Assaye Building,
Colaba,
Mumbai - 400 005.
... Petitioners.

V/s.

M/s. Arctic India,
7/A, Alfred Street,
Richmond Town,
Bangalore -560 025.
... Respondents.

Mr. S. R. Rajguru i/by Dr. T. C. Kaushik for the petitioners.

Mr. Sulip Sen i/by M.s D.S.K. Legal for the respondents.

CORAM : ANOOP V. MOHTA,J.

RESERVED ON : 23rd March, 2007.

PRONOUNCED ON : 25th April, 2007.

JUDGMENT

The petitioners have challenged award dated 29/03/2004 under Section 34 of the Arbitration and

Conciliation Act-1996 (for short," Arbitration Act.)

2. A contract was executed by and between the parties in respect of replacement of BER A/C plant at NAD Karanja based on the tender dated 27/01/1996. The respondents' tender was accepted on 09/04/1996. The amount of contract was Rs.86,13,066/- (Rupees Eighty six lacs thirteen thousand sixty six only). The period of completion was 15 months. The date of commencement/ completion as per the work order was 24/04/1996 to 23/07/1997. The work was actually completed, as contended by the respondents, on 11/08/1999/01/10/1999. The claimant/respondents submitted final bill on 17/07/2002 but returned by the petitioners on 31/07/2002. Thus, as dispute arose a sole arbitrator was appointed by letter dated 26/03/2003, in view of terms and condition 70 of IAFW-2249 being part of the contract between the parties. The date of completion of contract as per work order for phase-I was 23/07/1997. The certificate of completion for phase-I was of 29/07/1999. There was no certificate of completion for phase-II. As final bill was returned unpaid, on 20/08/2002 a notice to invoke arbitration was issued by the respondents. As there was no appointment made,

by an order dated 31/01/2003 under Section 11 of the Arbitration Act-1996, this court has appointed an arbitrator. On 03/04/2003 the arbitrator entered into the reference.

3. The arbitrator fixed the date, time and place for hearing of the matter. The arbitrator has passed award dated 29/03/2004.

4. The respondents has preferred the present Arbitration Petition No.355 of 2004. He has also filed Arbitration Petition No.354 of 2004 for another contract between the parties.

5. By an order dated 24/11/2004, the Court had decided Arbitration Petition No. 354/2004, the petition under section 34 was dismissed. Based on the above order the present petition was also dismissed. The petitioners therefore, preferred an appeal and by an order dated 08/11/2006 the Division Bench has admitted the matter and after hearing the same remanded the Arbitration Petition No.355 of 2004 for re-hearing. By an order dated 07/02/2007 the present petition has been re-admitted.

6. A preliminary objection was raised by the petitioners on arbitrability of the claims. The learned Tribunal has rightly arrived at the conclusion based on Clause 70, as the arbitration clause provides that before arbitration clause was invoked there should be; either "completion" of works agreed to by both parties or; "alleged completion". In the present case, the respondents contended that the work had been completed, the petitioners however disputed the same. In view of this, the dispute was rightly referred to the arbitrator as the completion of the work itself was the bone of the contention. The other circumstances, as recorded by the learned Tribunal, is that the plant could not have been put to use from 29/07/1999 unless the contract had not been completed by the respondents.

7. In the present case as referred above, in Arbitration Application No. 212 of 2002 filed by the petitioner, arbitrator was appointed by this court on 31/01/2003 and thereafter, arbitrator entered into the record. The submission as raised by the learned counsel appearing for the petitioner that the dispute was not arbitral, therefore, has no force.

8. **Claim No.1:- The amount of the final bill-**

. After perusing all the above as well as the documents and after considering the submission of the learned counsel appearing for the petitioners, I have noted that though time was fixed for completion of the work, yet there was delay on the part of the petitioners (U.O.I.) as they failed to handover the building for dismantaling the old A/C plant. The petitioners altered the job as per their own will, that resulted in great delay in handing over the building to the contractor and in the result the contract could not be completed in time as stipulated. The arbitrator has observed that the contractor-respondents completed the works without getting an advance payment. The respondents, therefore, based on this, submitted the final bill alongwith the interest. The petitioners resisted the said final bill and claims made therein basically on the ground that the completion certificates were not enclosed. There is a observation that it was decided in a meeting in June, 1998 between the claimant and the Accepting Officer, to implement those changes as it will suit the users requirements. It was agreed to implement the same through the amendment. By letter

dated 11/09/1998 the claimant submitted the draft amendment for the purpose of record. By an order dated 31/10/1998 the decision was communicated to the extent of not to carry out the A/C works of the building No.9M33 but to complete the balance work as per CA on priority. In a meeting held on 13/10/1998, the proposed changes were again revived. Ultimately respondents' completed the work as per the proposal contained in the revised draft amendment on 29/07/1999. The completion certificate issued by GE on 11/08/1999. The claimant received total six RAR payments. The last payment was received on 08/08/1997. The 7th RAR bill which was submitted for 19.93 lacs on 01/09/1999, remained unpaid. 9. After completion of phase-I, phase-II tests were carried out from time to time i.e. from 24/08/1999 to 27/05/2000. There were no completion certificate issued by the respondents for phase-II. Having waited for phase-II completion certificate, lastly, the final bill submitted on 17/07/2002 for amount of Rs.41,36,217/- (Rupees forty one lacs thirty six thousand two hundred seventeen only) 10. Having once approved the peak monsoon test of phase-II by the Accepting Officer, between the period 24/08/1999 to 27/05/2000, the reasoning of non-rectification of defects for want of

non communication of no score sheet, analysis of results and disapproving other two tests, as observed by the arbitral tribunal cannot be faulted with. There is no perversity or illegality in this regard. The view as taken, therefore, is correct. As the learned tribunal has taken the view by giving full opportunity to the parties and basically on the foundation that the petitioners did not notify at any time the adverse observations, on any of the balance phase-II test and therefore rightly held that on the facts and circumstances of the case the phase-II test was completed on 27/05/2000.

11. The tribunal after giving due consideration to the final bill, submitted by the claimant, gave the detailed reasons itemwise, as tabulated and awarded amount for :- **Serial A- Item 1:** Costs of schedule 'A' as per work order. **Serial A- Item 2:** for change in scope of work. **Serial A- Item 3:** Escalation. **Serial A- Item 4:** Simple interest on Rs.19,93,000/- (Rupees Nineteen thousand ninety three thousand only) (VII RAR). The arbitrator has not granted any amount towards Serial No. A item 5 for loss of compensation.

12. The tribunal has also considered, as both the

parties agreed for the recoveries against the items serial A item 1, 3, 4, 7 and 8; schedule ’B’ stores, rent, non return of documents and TE,s recovery. Based on this, as reflected, the admitted deduction has been made and awarded the amount accordingly. The arbitrator has after considering the facts and circumstances of the case, rightly rejected the claim for compensation of the Petitioners.

13. In view of the delay caused by the petitioners and further reason that the contract period gets enlarged by more than two years and four months, the contention that the respondents are not entitled for the compensation though delay was caused by the petitioners needs to be dealt with in view of the terms and conditions. The condition put an embargo also on claiming interest on delay caused by either of the parties. **In Ramnath International Construction Pvt. Ltd. Vs. Union of India & anr. 2007(2) Supreme Court Cases 453** the supreme Court has dealt with same aspect in detail. The relevant paras are:-

> 13) We are fortified in this view by several decision of this Court. We may refer to two of them. In Associated Engg. Co. V. Govt. of A. P. this Court was concerned with an appeal which related to similar claims based on delays in

execution. The High Court had held (State of A.P. Vs. Associated Engg. Enterprises) thus (AIR P. 304, para 26)

"26. Applying the principle of the above decision to the facts of the case before us, it must be held that clause 59 bars a claim for compensation on account of any delays or hindrances caused by the department. In such a case, the contractor is entitled only to extension of the period of contract. Indeed, such an extension was asked for, and granted on more than one occasion. (The penalty levied for completing the work beyond the extended period of contract has been waived in this case.) The contract was not avoided by the contractor, but he chose to complete the work within the extended time. in such a case, the claim for compensation is clearly barred by clause 59 of the A.P. DSS which is admittedly, a term of the agreement between the parties."

14. This Court noticed that the claims were set aside by the High Court on the ground that those claims were not supported by any agreement between the parties, and that the arbitrator had travelled outside the contract in awarding those claims. This Court held that the said claims were not payable under the contract and that the contract does not postulate, in fact prohibits, payment of any escalation under those heads. It affirmed the decision of the High Court setting aside the award of those claims.

15. In Ch. Ramalinga Reddy Vs. Superintending Engineer, while considering the similar claim, this Court observed thus: (SCC P. 616,

para 17)

> "17. Claim 8 was for 'payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution'. The arbitrator awarded the sum of Rs.39,540. Clause 59 of the A.P. standard Specifications, which applied to the contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim falls outside the defined exceptions. When extensions of time were granted to the appellant to complete the work, the respondents made it clear that no claim for compensation would lie. On both counts, therefore, Claim 8 was impermissible and the High Court was right in so holding".

The respondents, therefore, are not entitled to claim any compensation for such delay. I am acceding to the submission raised by the counsel for the petitioner on this issue.

14. One more facet in this back ground is that the arbitrator can not go behind the agreed terms of the contract. The parties are bound by the same. In **Ramnath's case** (supra) the Supreme Court has restored the issue as under:-

> 18. In view of the clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages,

ignoring clause 11(C). In **Associated Engineering Co.** this court held (SCC pp. 103 & 105, paras 24,26 & 28)

24. "The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction...

26. A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside...

28. In the instant case, the umpire decided matters strikingly outside his jurisdiction. He outstepped the confines of the contract. He wandered far outside the designated area. he digressed far away from the allotted task. His error arose not by misreading or misconstruing or misunderstanding the contract, but by acting in excess of what was agreed. It was an error going to the root of his jurisdiction because he asked himself the wrong question, disregarded the contract and awarded in excess of his authority. In many respects, the award flew in the face of the

provisions of the contract to the contrary."

19. In **Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engineering Enterprises and another,** this Court held thus: (SCC pp. 300 & 310, paras 22,23 & 44 (h) LR 350 (SC), this court held thus:

. "The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may be tantamount to mala fide action.

. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose the agreement is required to be considered...

. He cannot award an amount which is ruled out or prohibited by the terms of the agreement."

15. In the present case, admittedly, from time to time, the time was enlarged as referred above by the petitioners themselves. The petitioners also cannot claim compensation for such delay. Specifically when the time was extended by the petitioners themselves and respondents had accepted the same and worked accordingly. The learned arbitrator therefore, after assessing the material on record and after taking into consideration the deduction as claimed and submitted, awarded Rs.27,55,350/- to the respondents against claim No.1. The grant of damages/compensation on the ground delay, as discussed above ought not to have been awarded. This part of the award is set aside.

16. As the final bill submitted by the claimant gives detailed calculation justifying the consumption for the bags, the deduction as claimed by the petitioners for an amount of Rs.25,000/- for not training the department personnel has also no force. It is always in the interest of the contractor to deploy the departmental personnel earmarked to run the plant safely and avoid higher risk of damage to the plant by mishandling. The conclusion that the training was imparted but the

certification was not finalized and put on record, therefore, needs no interference. The petitioners' case for non filing of the completion certificate of phase-II test has been considered and deducted Rs.20,000/- (rupees twenty thousand only) as a partial recovery for completion of phase-II test from the amount due to the claimant as he failed to get validation of phase-II tests results from the respondent effecting the completion of work.

17. The learned arbitrator after considering the material on record, rightly deducted an amount from the payment due to the claimant, for submission of proper tests certificate by quantifying the deficiencies. The arbitrator has granted a deduction to the petitioners towards the costs of rectification of pump with humidification kit. The costs of preparation of finalizing the bill has also been considered in favour of the petitioners.

18. The respondents had denied the allegations of the favouritism and fraud. The learned arbitrator after considering the report conducted by the government official, refused to adjudicate the point which was not the part of the reference or contract

between the parties. Even on merit, the enquiry report communicated by the accepting officer to alleged favouritism was not accepted by the disciplinary authority and he was allowed to retire from service honourably. The contract which was accepted by the parties mutually and freely, now cannot allow to be challenged by the petitioners at this stage, in this proceedings, on this unproved allegation of fraud or favouritism. The submission therefore, on the basis of favouritism and of high rate of acceptance as contended by the petitioners (U.O.I.) in claim No.1, therefore has been rightly rejected.

19. The petitioners (U.O.I.) made another submission with regard to the deduction towards rectification in respect of CA No.CEDZ 26 of 93-94 for central A/C plant to RR Hospital, Delhi Cantt. under CE Delhi Zone amounting to Rs.4,16,71,000/- (Rupees four crore sixteen lacs seventy one thousand only) which has been rejected, in the facts and circumstances of the present case by the learned arbitrator. As recorded the amount so claimed in the other contract is in dispute. It is not yet determined or ascertained. therefore, no dues are

payable by the contractor. The respondents have also counter claimed against the petitioners in reference to the claim CE Delhi zone an amount of Rupees six crores. The proposed deduction by the petitioners in that matter is subjudice and under arbitration.

20. The submission on the power of Government to withheld the amount due from the other contract, based on Clause 67 of the general terms and conditions of the contract has been dealt with by the arbitrator by observing that the arbitrator has no jurisdiction to decide the dispute between the parties arising out of other contract is not correct. If contract provides such terms, the parties are bound by the same. However, in the case, between the parties, in the notice of invoking an arbitration clause, there was no such notice to withhold the amount. In effect there was no such ascertained claim or demand notice of amount due given to the respondent contractor at any point of time. Therefore, there is no case made out by the petitioner to withhold or to adjust the amount as submitted.

21. The claim of payment of interest on modified award, as observed above for the pendente lite and after the date of actual payment as recorded below cannot be said to be unjust or unreasonable. The interest after considering various factors have been awarded are :

(a) Past and Pendent lite interest on claim Nos. 1 as modified, at simple interest 12 % (Twelve percent) per annum w.e.f. 17/07/2002 to date of award.

(b) Further interest is awarded on, now modified, claims of contractor. Interest will be calculated from 01/07/2004 (after allowing a reasonable period for making payment in terms of this award) onwards till date of actual payment, as simple interest at 9% (Nine percent) per annum.

(c) There will be no future interest on past interest and pendent lite interest calculated as per para (a) and (b) above.

22. The rate of interest in the facts and circumstances of the case, need no interference. In **Godrej Properties & Investments Ltd. Vs. Tripura Construction, Mumbai 2003(2) Mh.L.J. 306,** after considering a Division Bench judgment in **U.P. Co-operative Federation Ltd. Vs. M/s. Three Circles, 2000(3) Mh.L.J. 730 =2000(3) Bom.C.R. 360,**

held that the grant of interest at three stages, as interest of arbitrator referred above is within the purview of law.

23. The decision of the Supreme Court in **The State of Manipur Vs. Sangreihan Muivah, 2001(3) Arb. L.R., 140 (SC)** is of no assistance to the petitioner, as there is no case of interest on delayed advance. It is the case of interest on balance payment as per final bill submitted. In the result, after considering the merit of the matter I am of the view that the present award needs modification in view of the substantive law and the terms of contract as referred above. There is a case made out by the petitioners by invoking the provisions of Section 34, 24, 28, 31(3) of the Arbitration Act & relying on **Oil and Natural Gas Corporation Ltd. Vs. Vs. SAW pipes Ltd., AIR 2003 SC 2629.**

24. After considering the facts and circumstances of the case and the provisions of Section 34 of the Arbitration Act, I am of the opinion that the quantum of claim as granted and the quantum of the claim as rejected can be gone into as there is a case of perversity or illegality made out to the limited

extent as observed above. In **Krishna Bhagya Jala Nigam Ltd. Vs. Harischandra Reddy & anr. (2007) AIR SCW 527** the Supreme Court has modified the award on the point of interest. In following case the Supreme Court has modified the award even on merit and restricted claim and interest. The Apex Court in **Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation (2006) 4 SCC 445** has endorsed and accepted the modification of award by the trial court. In that case the award was challenged under Section 34 of the Arbitration Act. The trial court by the judgment, allowed the petition in part. In an appeal under Section 37 of the Act, the said judgment of the trial court was set aside and the award was upheld in entirety. However, the Apex Court has upheld the trial court's order of partial modification. The Supreme Court in **Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & Ors. (2006) 11 SCC 181** has modified the award on merit as well as on interest. In **Tata Hydro-Electric Power Supply Co. Ltd. Vs. Union of India 2003(4) SCC 172**, the Supreme Court has modified the award. Therefore, as there is no bar under the act to modify the award and in the fact and circumstances of the case I am acceding to the submission made by the counsel appearing for the

petitioner. Only for the above extent, the award stands modified for the above reasons.

25. The claim for costs of arbitration has been rightly concluded by observing that it will be fair and reasonable to the contractor to bare costs of arbitration.

26. The impugned award is partly modified, in so far as the grant of damages on the ground of delay in favour of respondents in claim No.1. The rest of award is maintained as observed above. The petition is disposed off accordingly.

27. No costs.

[ANOOP V. MOHTA, J.]